ADVISORY GROUP TO THE NEW YORK FEDERAL-STATE JUDICIAL COUNCIL

Report on How the New York Federal Courts Handle Ancillary and Pendent State Claims Where All Federal Claims Have Been Dismissed

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This report proposes ways in which the standard used to determine whether to retain jurisdiction over supplemental state law claims, under 28 U.S.C. § 1367(c)(3), once all jurisdiction-conferring federal claims have been dismissed, can be clarified to take into consideration Federal-State comity and efficiency concerns. Briefly, the report concludes that the often held view in the Second Circuit, that all state law claims "should" be dismissed absent "extraordinary circumstances," and that the key driving factor is the stage at which the federal claims are dismissed – a continuum that starts before discovery commences and continues up until trial – can be clarified by taking into account other concerns; namely, (1) whether the state law claims can be easily resolved by the federal court, (2) whether the state law claims are plainly without merit, (3) whether dispensing with the federal claim has a preclusive effect on one or more state law causes of action and (4) whether there is evidence of forum manipulation.

As noted above, the primary reasons driving this suggestion are Federal-State comity and efficiency concerns. For example, when a state law claim can be easily resolved at summary judgment, or on a motion to dismiss, by a federal court, rather than by dismissing such a claim for lack of subject matter jurisdiction to state court, efficiency concerns will often counsel in favor of retaining jurisdiction and resolving all claims at one time. In general, courts prefer not to receive cases that have already been handled by

another court, and litigants and their counsel also generally prefer to have all matters finally resolved in one court.

Thus, this report recommends that the factors typically referred to in a section 1367 analysis be expanded to include the four factors listed above. This report also recommends that in order to accomplish this goal, the Second Circuit Judicial Council consider circulating this report, or a similar version, to help increase awareness of these other factors and their use by courts under the appropriate circumstances.

I. Introduction

The modern supplemental jurisdiction doctrine traces its origins to the United States Supreme Court's ruling in United Mine Workers v. Gibbs, 383 U.S. 715 (1966). In Gibbs, the Court both clarified and broadened the circumstances under which a federal court could exercise supplemental jurisdiction. According to Gibbs, "considerations of judicial economy, convenience and fairness to litigants" support broad authority in the federal courts to maintain jurisdiction over state law claims.[1] At the same time, Gibbs drew a distinction between the broad power of a federal court to hear state law claims and the discretionary exercise of that power. The Court recognized that a federal court's determination of state law claims could conflict with principles of comity and with providing litigants a consistent, sure-footed application of state law.[2]

Subsequent Supreme Court rulings interpreted Gibbs to encourage federal courts to "consider and weigh in each case, and at every stage of litigation, the values of judicial

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[1] Gibbs, 383 U.S. at 726.

[2] Id. at 726 ("Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.").

economy, convenience, fairness and comity in order to decide whether to exercise jurisdiction . . . ."[3]

With these principles in mind, and at the invitation of the Supreme Court, Congress codified the common law doctrines of pendent and ancillary jurisdiction,[4] including the circumstances under which federal courts could decline to exercise supplemental jurisdiction. More specifically, 28 U.S.C. § 1367(c)(3), grants federal courts wide discretion to decline to exercise jurisdiction over state law claims when all federal claims in an action have been dismissed.

A review of Second Circuit case law reveals that the overriding consideration for federal courts in exercising this discretionary authority is the stage of the litigation at which the federal claims are dismissed. The earlier the federal claims are dismissed, the more likely a district court will be to remand or dismiss state law claims without prejudice. The further along in the litigation the federal claims are dismissed, the more likely a district court will retain jurisdiction over pendent or ancillary state law claims. In fact, at times, language in some decisions in the Second Circuit suggests something of a concrete timeline, indicating that "if federal claims are dismissed before trial . . . the state claims should be dismissed as well."[5] Only in "extraordinary circumstances," according to some district courts, should a court exercise supplemental jurisdiction before trial.[6]

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[3] Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 349 (1988).

[4] Congress also eliminated the distinction between pendent and ancillary claim jurisdiction, bringing both under the single heading of "supplemental jurisdiction."

[5] Castellano v. Bd. of Trustees, 937 F.2d 752, 758 (2d Cir. 1991).

[6] See, e.g., Agway, Inc. Employees' 401(k) v. Magnuson, No. 5:03-CV-1060, 2006 WL 2934391, at *26 (N.D.N.Y. Oct. 12, 2006).

While this pre-trial/post-trial, "stage of the litigation" approach is often an effective approximation of federal resources expended in a litigation and often strikes an appropriate balance between convenience, comity, judicial economy and fairness to the litigants, federal-state court efficiency on supplemental claims can be improved if federal courts also consider that:

> (1) Trial is no longer a singularly reliable benchmark for determining whether to retain jurisdiction over state law claims;
>
> (2) Application of additional factors such as the overlap between the federal and state law claims, and the potential ease with which state law claims can be resolved at the federal level, will inform the section 1367(c)(3) analysis and thereby better conserve federal and state judicial resources.

More specifically, Second Circuit courts should consider retaining jurisdiction over state claims when the claims are easily resolved,[7] plainly without merit[8] or when dismissing the federal claim has a preclusive effect on one or more state law causes of action.[9]

This report recommends that federal courts sitting in New York clarify their current approach to exercising supplemental jurisdiction by reconsidering the strong presumption against retaining jurisdiction before trial and by more routinely infusing the section 1367(c)(3) analysis with these additional considerations.

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[7] See, e.g., Groce v. Eli Lilly & Co., 193 F.3d 496, 501 (7th Cir. 1999); Khan v. State Oil Co., 93 F.3d 1358, 1366 (7th Cir. 1996) (jurisdiction over supplemental state claim retained because it lacked merit and involved elementary contractual interpretation), *vacated on other grounds,* 522 U.S. 3 (1997).

[8] See, e.g., Brazinski v. Amoco Petroleum Additives Co., 6 F.3d 1176, 1182 (7th Cir. 1993).

[9] See, e.g., Miller Aviation v. Milwaukee County Bd. of Supervisors, 273 F.3d 722, 731 (7th Cir. 2001) ("When the district court, in deciding a federal claim, decides an issue dispositive of a pendent claim, there is no use leaving the latter to the state court.") (citations omitted).

II. Rethinking the Discretionary Supplemental Jurisdiction Paradigm

The current paradigm in considering whether to exercise supplemental jurisdiction can be generally summarized as follows. When a district court dismisses all federal claims during the preliminary stages of litigation (when there has been no significant activity aside from consideration of a motion to dismiss) the interests articulated in Gibbs are best served by dismissing the supplemental state law claims without prejudice. Comity and fairness favor dismissal, as it avoids needless federal resolution of purely state law and permits state law to develop in state court.[10] Judicial economy is also served as additional federal resources are not expended on state law claims when the jurisdiction-conferring federal claims have been dismissed. Unless the state claim involves a "uniquely federal interest,"[11] district courts generally decline to exercise supplemental jurisdiction under these circumstances.

Conversely, when the dismissal of federal claims occurs late in an action (on the eve of trial or at the summary judgment stage) the balance of the Gibbs factors points toward retaining federal jurisdiction. The interests of judicial economy, comity and convenience are all served when the court retains jurisdiction because it prevents the parties from having to resubmit the claims to state court and it avoids having a state court replicate the time already spent reviewing the claims. As the Second Circuit explained in Motorola Credit Corp. v. Uzan, 388 F.3d 39 (2d Cir. 2004):

> [W]hen the dismissal of the federal claim occurs "late in the action, after there has been substantial expenditure in time, effort and money in

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[10] Gibbs, 383 U.S. at 726.

[11] See, e.g., Capoccia v. Carole Boone, No. 1:07-CV-12, 2007 WL 1655348, at *5 (D. Vt. June 5, 2007) (finding a unique federal interest because a finding of fraud or conspiracy on state claims might have impacted a defendant's grand jury proceeding and federal conviction).

> preparing the dependent claims, knocking them down with a belated rejection of supplemental jurisdiction may not be fair. Nor is it by any means necessary."

Id. at 56 (quoting Purgess v. Sharrock, 33 F.3d 134, 138 (2d Cir. 1994)). In such circumstances, unless the state claim involves a novel question of state law, or requires a judge to resolve a dispute in an area traditionally reserved for the states, district courts generally exercise supplemental jurisdiction.

In following this approach, nearly all district courts cite the same language from the Supreme Court's decision in Carnegie-Mellon Univ. v. Cohill:

> In the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under pendent jurisdiction – judicial economy, convenience, fairness and comity – will point toward declining to exercise jurisdiction over the remaining state law claim.[12]

Using this standard as a benchmark, approaches among courts vary, some courts apply the standard flexibly, perhaps cognizant of the Supreme Court's use of the words "the usual case," while others appear to elevate this "stage of the litigation" approach to a virtual per se rule. No doubt, the point of trial can serve as an accurate benchmark, marking the point at which substantial federal resources have been committed and therefore justifying the retention of state law claims. But it is not the only useful benchmark. Substantial time, effort and resources are routinely spent well in advance of trial, by both court and counsel alike, particularly as the burdens of discovery have only increased since Cohill was decided in 1988. And the often applied presumption among district courts – arising from Cohill – that a court must look for "extraordinary circumstances," or a "unique," "unusual" or "rare" case in order to retain supplemental

[12] 484 U.S. at 350 n.7.

jurisdiction when federal claims are dismissed before trial results in the quick dismissal of supplemental state claims when, perhaps, not all should be dismissed.[13]

Judicial economy, and considerations of fairness and burdens to counsel and the resulting expense to clients, may, in short, be disserved by adhering to such a strong presumption.[14] The doctrine of supplemental jurisdiction, as the Second Circuit noted, is a "doctrine of flexibility, designed to allow courts to deal with cases involving pendent claims in the manner that most sensibly accommodates a range of concerns and values."[15] Clarifying that the rigid pre-trial/post-trial paradigm is not the only benchmark for determining whether to exercise supplemental jurisdiction will allow district courts to more accommodate these comity and efficiency concerns.

III. Clarifying the Analysis in the Second Circuit

A survey of the factors guiding federal courts in a section 1367(c)(3) analysis reveals that considerations outside the "stage of the litigation" benchmark have been used to evaluate and balance the underlying values of economy, convenience, fairness and comity. While none are dispositive, each of the factors below contributes to a more

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[13] See, e.g., Jones v. Mega Fitness, Inc., No. 94 Civ. 8393, 1996 WL 348206, at *2 (S.D.N.Y. June 21, 1996) (declining to exercise supplemental jurisdiction because the case did not present "extraordinary" or "unique" circumstances which would justify the retention of non-federal claims); see also Baylis v. Marriot Corp., 843 F.2d 658, 665 (2d Cir. 1987) (declining to exercise jurisdiction over state claims because the suit was not one of the "rare cases where retaining jurisdiction would be appropriate"); Shoenfeld v. Worldwide Dreams LLC, No. 98 Civ. 7093, 2000 WL 28159, at *6 (S.D.N.Y. Jan. 13, 2000) (declining to exercise discretionary supplemental jurisdiction because the case did not present "unusual circumstances").

[14] See, e.g., Roffman v. Knickerbocker Plaza Assocs., No. 04 Civ. 3885, 2008 WL 919613, at *16 (S.D.N.Y. Mar. 31, 2008) (declining to exercise jurisdiction over state law claims despite the plaintiff's advanced age, the submission of a summary judgment motion, and the supervision of the entire pretrial discovery process, in large part, because a trial date had not yet been set); JSMS Rural v. GMG Capital Partners III, No. 04 Civ. 8591, 2006 WL 1867482, at *4 (S.D.N.Y. July 6, 2006) (district court had overseen substantial discovery, decided a motion to dismiss and a motion for summary judgment but declined to exercise supplemental jurisdiction over state law claims because the case had not yet reached trial).

[15] Raucci v. Town of Rotterdam, 902 F.2d 1050, 1054 (2d Cir. 1990).

flexible and ultimately, we believe, more efficient disposition of section 1367(c)(3) supplemental jurisdiction cases.

A. The Merits and Factual Premises of the State Claim

When the appropriate resolution of a supplemental claim, involving well-established principles of state law,[16] is straightforward and can be determined without extensive further proceedings, and where resolution is dependent on familiarity of complicated facts that the federal court has mastered in order to dispose of the federal claims, judicial economy is often best served by retaining jurisdiction and resolving that claim.[17] This may be true even in absence of complicated facts. In Brazinski v. Amoco Petroleum Additives Co., 6 F.3d 1176, 1182 (7th Cir. 1993) the court observed:

> if the correct disposition of a pendent claim or action [is] so clear as a matter of state law that it could be determined without further trial proceedings and without entanglement with any difficult issues of state law, consideration of judicial economy warrant[s] retention and decision rather than relinquishment of the case to state court.

District court opinions in New York have cited Brazinski to retain jurisdiction over state law claims when the outcome of these claims is plain.[18] These district courts recognize that, under these circumstances, no purpose is served by remanding, or

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[16] Defining with precision the meaning of "well-established principles of state law" is difficult given the continuum of cases in which the question can arise. In general, applying a well-settled standard of law to a particular set of facts represents, in the Committee's view, an area where a District Court would be acting well within its discretion in retaining jurisdiction because the issues of State law are well-settled. In contrast, if the question involved a pure issue of law that is the subject of conflicting state court decisions, or has not been clearly decided, that is an application of state law that may fairly be said to not be well-settled and a District Court would be acting well within its discretion in dismissing such a claim.

[17] See, e.g., Motorola Credit Corp. v. Uzan, 388 F.3d 39, 47 (2d Cir. 2004) ("Considering the significant (and probably non-duplicable) judicial resources that the District Court expended to evaluate the enormous record, to craft findings of fact, and to impose remedies, it would have stood judicial economy on its head not to proceed with the state claims....") (internal citations omitted).

[18] See, e.g., Waterman v. Transport Workers' Union Local 100, 8 F. Supp. 2d 363, 369 n.2 (S.D.N.Y. 1998); Kaplan v. Lazard Freres & Co., L.L.C., Nos. 99 Civ. 3428, 99 Civ. 443, 2000 WL 145958, at *7 (S.D.N.Y. Feb. 7, 2000).

dismissing state law claims without prejudice, and thus prolonging a meritless or "doomed litigation" by sending it to the state court only to have those claims dismissed there.[19]

B. The Impact of the Federal Dismissal on the State Claim

The similarity between a state law claim and a federal claim may also factor into a district court's decision to retain supplemental jurisdiction. When a district court, in resolving a federal claim, decides a legal or factual issue dispositive of a pendent state law claim, there is no practical benefit served by dismissing the state law claims on jurisdictional grounds and leaving it to be resolved on the merits in state court.[20] A comparison of the decision in Timm v. Mead Corp., 32 F.3d 273 (7th Cir. 1994) and the decision in Tojzan v. New York Presbyterian Hosp., No. 00 Civ. 6105, 2003 WL 1738993 (S.D.N.Y. Mar. 31, 2003), provides an illustrative juxtaposition. In both cases, plaintiff sued an employer under the Age Discrimination in Employment Act and brought pendent state claims under the relevant state discrimination law. In both cases, the federal claims were dismissed on summary judgment after extensive pre-trial discovery.

In Timm, the court affirmed the district court's decision to retain supplemental jurisdiction over the state discrimination claim because it "had been fully briefed and argued," the record was complete and accurate and the applicable state discrimination law was straightforward. According to the court, the "district court reasonably concluded that there was no need to delay the resolution of the matter (and add to the burdens of the

[19] Sullivan v. Conway, 157 F.3d 1092, 1095 (7th Cir. 1992).

[20] Wright v. Associated Ins. Companies, Inc., 29 F.3d 1244, 1251 (7th Cir. 1994).

Illinois court system) by having the parties litigate the unspectacular state law issues anew in state court."[21]

By contrast, on similar facts, the district court in Tojzan dismissed the plaintiff's state law disability discrimination claim without prejudice after disposing of the federal claims. The district court reasoned that while the case had been briefed on summary judgment, and while the parties had conducted significant discovery, because the New York State Human Rights Law defines "disability" more broadly than the ADEA, the state law claims should be dismissed without prejudice. Other district court decisions in New York have dismissed pendent state law claims after extensive discovery because the federal law at issue was not precisely coterminous with the well-settled analog of a state law regime.[22]

Although state law analogs to federal claims may not always be precisely the same, if the state law is well-settled, and the issues not particularly unique, overall interests of judicial economy as between the state and the federal system, as well as easing the burdens on the litigants, counsels in favor of a federal court retaining jurisdiction over state law claims and resolving them at the same time as a federal claim is resolved. Where truly novel issues of state law are at issue, however, interests of comity should override these concerns and remand would be warranted.

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[21] Timm, 32 F.3d at 277.

[22] See, e.g., U.S. Info. Sys., Inc. v. International Brotherhood of Electrical Workers, No. 00 Civ. 4763, 2007 WL 2219513, at *15 (S.D.N.Y. Aug. 3, 2007) (dismissing state law claims based on the same facts as the federal claim without prejudice because the Donnelly Act, although patterned after the Sherman Antitrust act, may not share the same standard for demonstrating antitrust conspiracy).

C. Forum Manipulation

As some courts in the Second Circuit have held, when a litigant attempts to avoid the potential enforcement of a judgment, or engages in forum gamesmanship, the Gibbs principle of fairness to litigants may point towards maintaining jurisdiction.[23] Indeed, the Supreme Court's decision in Cohill highlights the point in an often-repeated context: plaintiff files a complaint containing state and federal claims in State Court, defendant removes on federal question grounds, plaintiff seeks to drop the federal claim and remand in light of the absence of a federal claim.[24] In that context, the Supreme Court held that it was appropriate to consider issues of forum manipulation:

> A district court can consider whether the plaintiff has engaged in any manipulative tactics when it decides to remand a case. If the plaintiff has attempted to manipulate the forum, the court should take this behavior into account in determining whether the balance of factors to be considered.... support a remand.

Cohill, 484 U.S. at 357.

The Second Circuit adopted just such an analysis in this context. In Mizuna Ltd v. Crossland Federal Savings Bank, 90 F.3d 650 (2d Cir. 1996), plaintiff brought suit in state court and defendant removed the case to federal court based on the FDIC's status as a federal party.[25] After the district court dismissed the FDIC from the case, plaintiff moved for remand. The Second Circuit affirmed the district court's decision to retain jurisdiction, holding that the plaintiff's "fairly bald effort" to avoid an unfavorable

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[23] See also Alden v. Univ. of San Diego, No. 91-55921, 1992 WL 152957, at *1 (9th Cir. July 6, 1992) (affirming federal jurisdiction over pending state law claim based, in part, on possible forum manipulation by the plaintiff).

[24] Payne v. Parkchester, 134 F. Supp. 2d 582, 586 (S.D.N.Y. 2001); Hernandez v. Lutheran Medical Center, No. 01-CV-6730, 2002 WL 31102638, at *2 (E.D.N.Y. Sept. 11, 2002).

[25] Mizuna, 90 F.3d at 657.

outcome that the federal court had already foreshadowed warranted retaining supplemental jurisdiction over pendent state claims.

Consideration of this "manipulating the forum" factor should not be (and is not) limited to the removal and remand context. In an appropriate case, it may also be relevant in considering how best to exercise section 1367 discretion in a case originally commenced in federal court. When making that determination, the Second Circuit has held that consideration of the following non-exclusive list of factors is appropriate: "judicial economy, convenience, fairness, and comity." Nowak v. Ironworkers Local 6 Pension Fund, 81 F.3d 1182, 1191 (2d Cir. 1996). The "fairness" factor, in an appropriate case, can and should encompass "manipulating the forum."[27]

The Second Circuit's decision in Motorola Credit Corp. v. Uzan, 388 F.3d 39 (2d Cir. 2004) illustrates the point. There, after the only federal claims upon which federal jurisdiction was originally based were dismissed on appeal, the Second Circuit instructed the District Court, on remand, to determine whether to exercise supplemental jurisdiction over the remaining state law claims. On remand, the District Court determined to exercise supplemental jurisdiction, and on subsequent appeal from a final judgment, the Second Circuit upheld the District Court's decision to do so, after citing the Nowak factors. The Second Circuit reasoned, in part, that because defendants took "affirmative steps to frustrate any potential enforcement of a judgment against [plaintiffs], we perceive a strong 'fairness to litigants' argument in favor of maintaining jurisdiction."[28]

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[26] Id.

[27] Motorola Credit Corp. v. Uzan, 388 F.3d at 39, 57 (2d Cir. 2004).

[28] Motorola Credit Corp., 388 F.3d at 57; see also Palmer v. Web Industries, No. CV 04-2362, 2007 WL 625924, at *3 (D. Ariz. Feb. 26, 2007) ("Attempts to manipulate the forum should properly be taken into

In short, in an appropriate case, the breadth of discretion afforded District Courts in conducting a section 1367 analysis can include a "manipulation of the forum" factor, both in the removal/remand context as illustrated by Cohill and Mizuna, as well as in the a case originally filed in Federal Court, as illustrated by Motorola. The routine summary of section 1367 factors, however, does not typically contain this forum manipulation assessment. A more widespread recognition of this factor would further encourage its consideration in the appropriate case.

IV. Conclusion

Whether a case is ready for trial need not be the driving consideration in determining whether to exercise supplemental jurisdiction under section 1367. Consideration of other factors is also warranted: (1) the merits of the state law claims and the extent to which the federal court has been required to familiarize itself with a complicated set of facts to resolve the federal claims; (2) the impact of dismissal of the state law claims on jurisdictional grounds; and (3) evidence of forum manipulation. Clarifying that this more flexible approach is appropriate and taking into account these additional factors, would result in greater efficiencies to both court, counsel and litigants and would result in a more effective consideration of Federal-State comity concerns.

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account in balancing the principles of [judicial] economy, convenience, fairness, and comity which underlie the pendent jurisdiction doctrine") (citations omitted).

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